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AUTHOR	Scott, Marianne
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ABSTRACT

This paper highlights some issues of concern for national libraries about the way national copyright legislation and, increasingly, international agreements may effect how successful they are in carrying out their mission. Discussion includes copyright and exceptions to copyright; preservation and access; preservation exceptions; access exceptions; recent amendments to copyright legislation; and international initiatives. The paper concludes that the concept of a national library as an institution, which promotes the published heritage of a country and facilitates access to that heritage, should not be perceived as being in conflict with copyright owners; in the end, what is required is understanding and trust between all parties in the information chain. (AEF)

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Legal deposit and copyright: some issues of concern

Marianne Scott
Ottawa, Canada

The value, and in fact the necessity of having the published heritage of a country collected, preserved and made accessible to its citizens and those of the world is not something that needs to be promoted at a gathering such as this. We all take that as a given.

However, in this ever shrinking and technologically complex world, the ability of national agencies such as national libraries to be successful in this critical part of their mission is becoming increasingly difficult. This session is discussing many aspects of that challenge.

My presentation will highlight some issues of concern for national libraries about the way national copyright legislation and, increasingly, international agreements may effect how successful they are in carrying out their mission.

Copyright and exceptions to copyright

Copyright is essential for the protection of the moral rights of an author as well as for controlling the commercial exploitation of a work. At the same time there needs to be a way in which a work can be accessed in a non-exploitive manner in support of research, independent study, critical comment and, of course, casual interest. It is to facilitate these non-commercial uses that

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librarians have championed exceptions to the basic rules of copyright in order to ensure that information will be accessible to all that need it now and in the future

In today's world balancing the rights of copyright owners with the needs of libraries and their users is becoming increasingly complex. We are no longer dealing with one physical copy of a publication, the use or abuse of which can be controlled relatively easily. We are dealing with electronic versions of information, which from the copyright owner's perspective have the potential for great abuse. For this reason, there is a tendency in current national debates on the revision of copyright legislation in the digital environment for the proposed rules of use to become more restrictive. As an example, it has been suggested that the present generally accepted fair practice type of exceptions should be eliminated.

Preservation and access

National depository agencies have two fundamental reasons for requiring exceptions within copyright legislation: the necessity to preserve and the need to provide access. This requirement is in no way frivolous, not when the activities related to preservation and access are understood. Acquiring, preserving and providing access to all formats of the published heritage of a country is, as has been stated before, fundamental to the mission of a national depository such as a national library.

To illustrate why national libraries need exceptions to copyright, it may be helpful to review some typical activities that occur within depository libraries in the context of preservation and access. The examples should help to clarify what kinds of exceptions are needed to enable the library to carry out its role and indicate what kind of limitations or conditions might be attached to such exceptions. The examples will also serve to highlight the differences that are beginning to appear between the copyright protection of conventional formats and those involving digital materials.

Preservation exceptions

Let us look first at the case where the library needs to make a copy of a printed document as a replacement for an original copy in the deposit collection that is damaged, deteriorating, or lost, or as a service copy to be used in place of an original that is too fragile for use

Assuming the work is not in the public domain but still protected by copyright, making that copy without the permission of the copyright owner, or without an exception in the national copyright law, would constitute an infringement of the reproduction right.

In a number of jurisdictions, however, there is a "preservation" exception that allows a library to make a copy of the work for purposes of replacing an original copy that is damaged or deteriorating or to make a copy of the work for use as a service copy to be used in place of an original copy that is too fragile for use. The exception may also allow a library to make a copy of the work from a copy in another library's collection for purposes of replacing an original copy that has been lost.

There may, however, be limitations or conditions attached to the exception. Copying may not be permitted if a suitable replacement copy is available commercially. As well, the copy may have to be recorded and/or reported to the copyright owner or collective.

Compare that now with a similar case involving an electronic document. Suppose the library needs to make a copy of an electronic document as a replacement for an original copy in the deposit collection that is in an obsolete format or requires the use of hardware or software that is not available. Again, without permission of the copyright owner or an exception, making the copy would constitute an infringement of the reproduction right.
In addition, under newly enacted provisions in a number of jurisdictions the library may also be liable to sanctions against circumvention of technological protection measures.

In some jurisdictions, exceptions have been put in place to allow a library to make a copy of the work for purposes of replacing an original copy in the library's collection that is in an obsolete format or requires the use of hardware or software that is not available. In some circumstances as well there are exceptions allowing a library to circumvent any technological protection measures applied by the copyright owner to the original that would prevent the making of the copy.
Again there are usually certain limitations or conditions that may apply: copying may not be permitted if a suitable replacement copy is available commercially; the copy may have to be recorded and/or reported to the copyright owner or collective; and circumvention of technological protection measures may be permitted only to the extent that is required to make the replacement copy.

Access exceptions
Assume that the library needs to make a copy of an excerpt from a work in response to a reference or research request from a library patron. Without the permission of the copyright owner or an exception, making such a copy would constitute an infringement of the reproduction right.

Again, in some jurisdictions there are exceptions that allow a library to make a copy of an excerpt from a work on behalf of a patron who intends to use the excerpt for purposes of research or private study. In principle, there should be no limitations or conditions attached to this type of use other than those that are attached either explicitly or implicitly to fair practice, etc.

However, when we come to make a copy of an article from an electronic journal for a patron of another library requesting the article through interlibrary loan, and delivering the copy electronically, there are several rights attached.

Added to the reproduction right, the right to communicate has been added, as has a sanction against circumvention of technological measures.
It is necessary to acquire authorization to make a copy of a complete article from a periodical for a person requesting a copy for use in research or private study.
Authorization is required to transmit a copy of the article via a telecommunications network. In some cases, it is also necessary to have authorization to circumvent any technological protection measures applied by the copyright owner to the original that would prevent the making of the copy or its transmission

If the copying of an article from an electronic journal were permitted by an exception, there would likely be a number of limitations or conditions attached. In some cases, the exception may not apply to recently published articles (e.g., within the previous twelve months). The copy may have to be recorded and/or reported to the copyright owner or collective. The circumvention of technological protection measures may be permitted only to the extent that is required to make the copy and transmit it to the requesting library. The person making the request may be permitted to receive a printed copy only, or any digital copy provided to the person may have to have copy guard or timed expiry mechanisms attached to it. Finally, the library making the copy and the library receiving the copy may be required to destroy any intermediate copies made in the process of copying and transmitting the article.

The last example of an activity is one long associated with libraries, that of allowing a user to borrow or have access to a complete item, such as a book, either on the premises or away from the library. Sadly the flexibility once associated with the lending right seems to be disappearing with digital materials.

Current status of exceptions

Recent amendments to copyright legislation in a number of jurisdictions allow national depositories to engage in preservation copying of conventional publications with a minimum of administrative regulations. The same is true with respect to exceptions for copying articles from printed publications for interlibrary loan. An example of this is a recent amendment to the Canadian Copyright Act permitting copying of periodical articles for research or private study. In that particular case, the exception allows copying from scholarly, scientific or technical periodicals but puts a one-year waiting period to copy material from newspapers or other types of general periodicals. The exception does not allow copying from works of fiction, poetry, drama or music.

The real challenge, which is looming for all libraries, and national depositories in particular, is ensuring that the necessary exceptions are included in legislation which will permit preservation and access to digital online materials. With respect to preservation, there may be some light on the horizon. A number of publishers realizing the difficulties they are facing in long term preservation of this volatile format, appear to be ready to hand over this responsibility to the national depository. Just recently the IFLA/IPA Steering Group issued a joint statement on the importance of digital archiving and the key role that national libraries play in this area.

It is reassuring to hear of discussions and activities that are taking place in different countries (particularly within the European Union) to ensure that digital publications will be preserved. In the long run, I believe that it is in everyone's best interest for there to be statutory authority either in the legal deposit or the copyright legislation that will permit a national depository to make preservation copies of their collections and to reformat and refresh as necessary to ensure the long term viability of electronic information.

However, it may well be easier to solve the preservation dilemma than that of equitable access. In the past, we have had one physical item and one reader, quite within copyright provisions.

Now we have an electronic version of that item, deposited in an institution where it is possible for several readers to have access at the same time. There is also the possibility that a remote reader could not only abuse the economic rights but also the moral rights of the author. It is no surprise then that the owners of copyrights are promoting more restrictive copyright provisions (in fact, as mentioned earlier, requesting that the fair practice type of exceptions be severely curtailed for online digital materials). The growing call for sanctions against circumvention gives copyright owners an added measure of control, with the resulting possibility of using technological protection measures to override existing legal exceptions. This is of grave concern, for such restrictive copyright legislation will seriously limit the ability of national depositories to ensure universal and equitable access to the national heritage collection.

International initiatives

In times long past, it was enough to be concerned about your national copyright legislation. Today we need to include an understanding of international activities in our debates.

With the growing exchange of information internationally, it is becoming increasingly important for libraries to be aware of the possible impact of international treaties, and regional agreements on both their own national legislation and accepted practice. The World Intellectual Property Organization (WIPO), founded over a hundred years ago, was established to promote basic or minimal copyright protection for authors as their work began to be distributed more widely outside their own countries. WIPO, of course, deals with all aspects of intellectual property but our main interest is in their attention to copyright issues. Over the past 100 years, the organization has grown from its original nine members to over 178. It has also become increasingly active in promoting copyright.

In 1996, they addressed the digital environment, with the WIPO Copyright Treaty. In some ways, this initiative nearly caught the library community by surprise, but in the long run, a forceful coalition of library interests managed to effect a number of important changes in the original proposal. The intention of this Treaty is to establish a minimum set of international standards for the protection of digital materials. It is not mandatory for all member states of WIPO to adhere to the 1996 Copyright Treaty. However, when member states do sign the Treaty the copyright laws of that country must be in conformity with the WIPO Treaty.

There are also regional agreements, which have the potential to affect not only the members of that region but indirectly neighbouring countries. Examples of this are the European Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights and the European Union Database Protection Directive.

As the world shrinks and embraces globalization and increasing international trade it has now become necessary for libraries to be aware of the possible impacts on their services of some international trade decisions. While many of us may have thought of the General Agreements on Trade and Tariffs and the resulting World Trade Organization (WTO) as activities dealing with commodities, this is changing. In the introduction to the WTO and intellectual property on the WTO web page, the statement is made that "ideas and knowledge are an increasingly important part of trade." The WTO, with a membership of over 140 countries, oversees a variety of treaties governing trade. What makes the WTO unique is that it has a binding dispute resolution

mechanism with very strong enforcement procedures. There are two WTO treaties that could affect library services. The first is the General Agreement on Trade and Services (GATS), 1994. The second is the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), 1995. The stated goal of TRIPS is to "narrow the gaps in the way these rights are protected around the world, and to bring them under common international rules".

It is of great importance that all those concerned about equality of access to information world wide be aware of these new agreements and be prepared, on behalf of users, to lobby those responsible for making national commitments in the areas of trade and services.

IFLA, through its Committee on Copyright and Other Legal Matters, is attempting to bring the library point of view to the attention of the governing authorities of both WIPO and WTO. The Committee has also made presentations at WIPO and WTO meetings. More recently, a short document called Tips for TRIPS has been prepared for the use of the library and information community and it will be available on IFLAnet shortly. It is intended that this document be a guide to what TRIPS means and what to look out for.

Another recent very interesting activity, which is being undertaken by UNESCO, is a multi-year study on limitations and exceptions to copyright and neighbouring rights in the digital environment. This is a very important initiative and one, which provides an opportunity for the library community to make the case, on behalf of users worldwide, for preservation and access. I am pleased to report that IFLA has been invited to participate and CLM is presently in the process of preparing a requested 20-page contribution.

To achieve the necessary balance between the needs of users for reasonable access and the rights of copyright owners the national depositories need to be active on several fronts. The required flexibility for a national library can be achieved in different ways. First, through legislative action, either in the national deposit legislation or in the copyright legislation, to ensure that the necessary exceptions are available for both preservation and access. Second, by being proactive in supporting research into technologies that prevent both the altering of materials remotely and unauthorized use. Third, to use a phrase from current management jargon, by looking outside the box. By that, I am suggesting that ways and means outside of legislation be considered to ensure access. One such means might be for the national library to have a form of no fee license with the creators of electronic publications which will state quite clearly the obligations and responsibilities of the depository to protect the economic and moral rights of creators, while at the same time permitting these institutions to fully carry out their mission to collect, preserve and make accessible the published heritage of their country.

In conclusion, the concept of a national library as an institution, which promotes the published heritage of a country and facilitates access to that heritage, should not be perceived as being in conflict with copyright owners. In the end, what is required is understanding and trust between all parties in the information chain.

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